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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ARROWHEAD CREDIT UNION, Plaintiff and Respondent, v. DeROY J. AVILA, Defendant and Appellant.	E049542 (Super.Ct.No. CIVSS801741) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and dismissed in part.

DeRoy Avila, in pro. per., for Defendant and Appellant.

Solomon, Grindle, Silverman & Wintringer, Timothy J. Silverman and Grace E. Jo for Plaintiff and Respondent.

Appellant DeRoy Avila (DeRoy)[1] appeals after the trial court granted a writ of attachment against his home and another property in favor of Respondent Arrowhead Credit Union (Arrowhead) for a loan executed by Avila Construction, Inc. (ACI) upon which it had defaulted and for which DeRoy had signed a commercial guaranty agreeing to secure all debts of ACI. DeRoy also appeals the grant of a motion for summary judgment on the claim against him finding that he was responsible for ACI's defaulted loan and awarding damages under the commercial guaranty.

Since DeRoy failed to file an appeal from the order granting the writ of attachment, an appealable order under Code of Civil Procedure section 904.1, subdivision (a)(5),[2] and the time to do so has long since passed, we dismiss the appeal as it pertains to the order granting the writ of attachment. We affirm the trial court's grant of Arrowhead's motion for summary judgment.

I

PROCEDURAL BACKGROUND

On February 11, 2008, Arrowhead filed a complaint against ACI, Richard Avila, and DeRoy claiming default on a loan made to ACI by Arrowhead. The sixth cause action — the only one with which we are concerned in this appeal — alleged breach of

[1] Members of the Avila family will hereafter be individually referred to by their first names, not out of any familiarity or disrespect, but to ease the burden on the reader. (See, e.g., *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 803, fn. 2.)

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

commercial guaranty against DeRoy and demanded payment of $152,337.08 plus interest and late fees.

Attached to the complaint was a promissory note and a commercial loan agreement (the Note and the Loan Agreement) executed between Arrowhead and ACI in the amount of $155,382.28 effective February 28, 2005, for refinancing of two prior loans (executed in 1999 and 2004). A payment schedule was included in the Note and the Loan Agreement.

A commercial security agreement was signed by ACI in 1999 for a truck as collateral. Further, a security agreement was signed by ACI in 2004 for all of the inventory and accounts of ACI. Richard signed an "unlimited" commercial guaranty to cover all of the indebtedness to Arrowhead. DeRoy also signed an "unlimited" commercial guaranty (the D. Avila Guaranty) for all of the indebtedness of ACI. Thereafter, ACI defaulted on the Note.

On February 26, 2008, Arrowhead filed an ex parte application for writ of attachment or, in the alternative, for a temporary protective order against DeRoy and Richard on property owned by them. The properties included three real properties owned by Richard and DeRoy. Two were owned by DeRoy and were located in San Bernardino, located at 3111 Casa Loma Drive and 2863 N. F Street. The ex parte application was supported by a declaration from Arrowhead's counsel and one from the vice-president of member's business services at Arrowhead, Craig Burdette.

At the ex parte hearing conducted on February 26, 2008, at which counsel for DeRoy appeared telephonically, the trial court granted a temporary protective order. A hearing on the application for writ of attachment was set.

DeRoy and Richard filed opposition to the application for writ of attachment. DeRoy claimed he was retired and was not obligated on the business debt. He further sought an exemption for his real property. He signed a declaration that he was going to declare the North F Street residence as his homestead. He further claimed he had no involvement in the business, since he was retired.

Arrowhead filed a reply alleging that DeRoy's and Richard's opposition was untimely filed, DeRoy was still actively involved in ACI, the Note was entered into based on the D. Avila Guaranty, and declaration of the homestead did not affect Arrowhead's right to attach the property. Attached was a corporate resolution that showed DeRoy as president of ACI. Arrowhead's counsel also declared that she had received no settlement offer from DeRoy despite having made several requests for such an offer.

After a hearing conducted on May 13, 2008, the trial court granted the application and issued a writ of attachment against DeRoy's and Richard's real property.

Arrowhead filed its motion for summary judgment on April 22, 2009. The sixth cause of action alleged breach of commercial guaranty against DeRoy, as will be set forth in more detail, *post*. Both ACI and Richard had filed bankruptcy since the filing of the complaint, so the case could not proceed against them. DeRoy filed no opposition to the motion for summary judgment.

On July 13, 2009, the trial court submitted its 13-page tentative ruling granting the motion for summary judgment on the sixth cause of action. Arrowhead filed a motion for attorney fees and costs. The trial court granted the attorney fees and costs to Arrowhead on September 9, 2009.

An amended judgment was entered on September 9, 2009, awarding Arrowhead the sum of $199,194.71, which consisted of $152,337.28 in principal, $25, 943.93 in interest, $850 in late fees, $18,107 in attorney fees, and $1,956.50 in costs.[3]

II

FACTUAL BACKGROUND

As to the proceedings leading to the grant of the summary judgment motion, the facts are drawn from the unopposed material facts submitted with Arrowhead's motion for summary judgment. To the extent that the facts supporting the writ of attachment differ and are necessary to the resolution of the instant appeal, they will be discussed in detail, *post*.

On or about February 28, 2008, ACI executed the Note, in writing, for the principal sum of $155,382.28, which was to refinance two prior loans executed in 1999 and 2004. With the Note, ACI signed the Loan Agreement that stated the terms and conditions of the payment of the Note. According to the terms, the Note was to be paid off by monthly payments to be started April 10, 2005, and maturing on April 10, 2007.

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[3] The original judgment only awarded the sum of $174,689.77, plus interest.

The Loan Agreement included the terms of default, i.e., a failure to pay would accelerate the entire debt.

Previously, in 1999 and 2004, ACI executed commercial security agreements granting as security collateral owned by ACI. Further, on March 7, 2002, prior to the current Note being executed, DeRoy signed the D. Avila Guaranty "wherein he absolutely and unconditionally guaranteed payment by ACI of any and all of ACI's indebtedness to ARROWHEAD, plus costs and attorney's fees incurred in the collection thereof and the enforcement of the Loan Documents[4] including the D. Avila guaranty."

Arrowhead duly performed all of the conditions precedent on its part to be performed under the Loan Documents.

ACI made some payments pursuant to the terms of the Loan Documents but failed to make all of the payments. As a result, Arrowhead declared ACI to be in default. Arrowhead accelerated the Note and declared the entire unpaid principal balance immediately due and payable under the terms of the Loan Documents. ACI, Richard, and DeRoy did not respond to the demand for payment of the entire loan amount.

Due to the default of ACI, DeRoy was obligated to pay under the D. Avila Guaranty. DeRoy was responsible for $152,337.28, plus accrued interest through February 11, 2009, in the amount of $21,502.49, plus late fees totaling $850. Interest

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[4] Arrowhead defined the "Loan Documents" as the Note; the Loan Agreement; the November 12, 1999, and June 10, 2004, security agreements; and the D. Avila Guaranty.

continued to accrue at a rate of $29.22 per day. Attorney's fees were also due to Arrowhead under the Loan Documents.

At the hearing on the summary judgment motion, the trial court noted that DeRoy had not filed any opposition, and no argument was presented at the hearing by DeRoy or Arrowhead. The motion for summary judgment was granted.

III

WRIT OF ATTACHMENT

DeRoy asks this court to overturn the writ of attachment issued by the trial court. Although not raised by Arrowhead, the time to appeal the issue has long since passed, and we have no jurisdiction to hear the matter.[5]

Under section 904.1, subdivision (a)(5), the granting of a right of attachment is an appealable order. "'The time for taking an appeal is mandatory and jurisdictional.' [Citation.] Failure to file a notice of appeal within the required time period therefore mandates dismissal of the appeal. [Citations]' [Citation.]" (*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 Cal.App.4th 994, 998.)

The writ of attachment was ordered at the hearing on May 13, 2008, and signed the same day. DeRoy had 60 days in which to file a notice of appeal from the order granting the writ of attachment. (Cal. Rules of Court, rule 8.104.) DeRoy filed his notice

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[5] Although Arrowhead has not raised the issue, a failure to point out a jurisdictional defect does not waive the issue. (See *Hardin v. Elvitsky* (1965) 232 Cal.App.2d 357, 363.)

of appeal on October 26, 2009, which was over one year after the writ of attachment was granted. The judgment on the writ of attachment was final and not appealable at the time that the notice of appeal from the summary adjudication finding was filed.

There was no reason for DeRoy to delay filing his appeal. As stated in section 484.100, "[t]he court's determination under this chapter [issuing a writ of attachment] shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter nor shall they affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant. The court's determinations under this chapter shall not be given in evidence nor referred to at trial of any such action." The writ of attachment was a discrete proceeding that had no bearing on the trial in this case. DeRoy should have immediately appealed the attachment order.

Additionally, DeRoy's notice of appeal is deficient. On his notice of appeal, he specifically stated that he was appealing the "judgment after an order granting summary judgment."

A notice of appeal that expressly limits the appeal to a specific judgment is not adequate to appeal other orders. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625.) "Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed." (*Shiver, McGrane & Martin v. Littell* (1990) 217 Cal.App.3d 1041, 1045.) Since DeRoy's notice of appeal omits any reference to the

writ of attachment order under section 904.1, subdivision (a)(5), we have no jurisdiction to review that order.

Based on the foregoing, we dismiss DeRoy's appeal so far as it pertains to the granting of the writ of attachment. We will only address whether the trial court erred by granting Arrowhead's motion for summary judgment on the sixth cause of action in the complaint.

IV

MOTION FOR SUMMARY JUDGMENT

Despite DeRoy's failure to file any opposition to the motion for summary judgment in the lower court, he now claims that the trial court erred by granting summary judgment on the sixth cause of action for breach of commercial guaranty.

A. *Standard of Review*

"A trial court may only grant a motion for summary judgment if no triable issues of material fact appear and the moving party is entitled to judgment as a matter of law. [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.)

"[G]enerally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted; see also section 437c, subd. (c) ["[t]he motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as

a matter of law"].) "All that the plaintiff need do is 'prove[] each element of the cause of action.' [Citation.]" (*Aguilar*, at p. 853.)

Section 437c, subdivision (b)(3) addresses the opposition to a motion for summary judgment. It provides that "[t]he opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." "The separate statement is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process." (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 902.)

However, this court has concluded that, "[w]hile subdivision (b) of section 437c allows the court, in its discretion, to grant summary judgment if the opposing party fails to file a proper separate statement, this provision does not authorize doing so without first determining that the moving party has met its initial burden of proof." (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086 [Fourth Dist., Div. Two].)

An appellate court reviews "the trial court's grant of summary judgment de novo, applying the same statutory procedure followed in the trial court. [Citation.]" (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 574.) "The trial court's

decision to grant a motion for summary judgment because the opposing party failed to comply with the requirements for a separate statement, however, is reviewed for an abuse of discretion. [Citations.]" (*Parkview Villas Assn. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1208.) Here, the trial court analyzed the motion for summary judgment on the merits, deciding first whether Arrowhead had met its burden of proof, a decision we will review de novo.

B. *Analysis*

Civil Code section 2787 defines a guarantor as "one who promises to answer for the debt, default, or miscarriage of another . . . ." In order to establish a cause of action for breach of guaranty, it must be established that (1) a guarantor guaranteed payment of indebtedness of a primary obligor; (2) the primary obligor defaulted; (3) notification was given to the guarantor as to the primary obligor's default; (4) there was nonpayment of the debt by the guarantor; and (5) such breach resulted in damages. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 819.)

According to the sixth cause of action in the complaint, DeRoy had executed the D. Avila Guaranty on March 7, 2002, in which he "absolutely and unconditionally" guaranteed payment of any and all of ACI's debts to Arrowhead, and such guaranty was continuing. It also alleged that DeRoy had defaulted under the guaranty and had refused to pay $153,337.08 that was due, along with accrued interest and late fees.

In its motion for summary judgment, Arrowhead relied on 11 undisputed facts (unopposed by DeRoy), as outlined, *ante*, in part II; declarations from Melissa N.

Armstrong, Arrowhead's attorney; and a declaration from Burdette, who was the vice-president of members business services. Arrowhead also lodged the Loan Documents; Richard's commercial guaranty; certified mail to Richard and DeRoy from Arrowhead; and requests for admissions and responses by Richard, ACI, and DeRoy.

The trial court issued a 13-page statement of decision. It recognized that despite DeRoy's failure to file opposition, it must determine first whether there was any triable issue of fact. It found that Burdette's declaration supported the indebtedness of ACI. Further, Richard, who was an officer of ACI, admitted that he authorized the indebtedness. The Note and Loan Agreement provided the terms of default should there by a nonpayment. Further, the fact that DeRoy guaranteed the indebtedness of Arrowhead was proven by Burdette's declaration and DeRoy's admissions that he executed the D. Avila Guaranty. The terms of the D. Avila Guaranty itself provided that DeRoy was unconditionally required to pay the indebtedness of ACI to Arrowhead. The trial court also found Arrowhead duly performed its duties under the Loan Agreement as evidenced by Burdette's declaration and Richard's admissions. Default and notification of the default on the loan was shown by Burdette's declaration and Richard's admission. The trial court assessed damages based on the terms of the Loan Document.

Based on our review of the motion for summary judgment and the accompanying declaration and documents, we agree with the trial court's conclusion. As to the first element, the guaranty of payment of indebtedness, Burdette, who was vice-president of members business services and in charge of collection of ACI's obligations, declared he

was the custodian of records for Arrowhead. Burdette had personal knowledge of the Loan Documents executed with DeRoy, Richard, and ACI. DeRoy had signed the D. Avila Guaranty, which absolutely and unconditionally guaranteed payment of any indebtedness of ACI on an unlimited basis and was continuing. This included attorney fees incurred in collection. DeRoy admitted that he signed the guaranty. Further, Richard, who was then vice-president of ACI, admitted that he authorized the indebtedness.

As to the second element, that there was default by ACI. Burdette declared that ACI failed to make all the payments on the Note. DeRoy admitted that ACI had defaulted on its payments (although he denied that he had defaulted on the D. Avila Guaranty. Richard, on behalf of ACI, admitted that ACI had defaulted.

As to the element of notification, Burdette declared that he notified ACI and DeRoy of the default. Arrowhead lodged the letters sent to DeRoy notifying him of the default and demanding payment.[6]

It is undisputed that DeRoy failed to pay ACI's debt under the D. Avila Guranty. Burdette declared that no payment was made by DeRoy on the debt owed by ACI. DeRoy claimed in his admissions that he did not owe under the D. Avila Guaranty, but provided no opposition or evidence to support that assertion. The plain language of the

[6] At oral argument, DeRoy stated the notice was deficient. We will not consider that claim, which was raised for the first time at oral argument.

D. Avila Guaranty required payment by DeRoy and provides a prima facie case that DeRoy breached his guaranty.

Finally, damages were shown by the evidence presented with the motion for summary judgment. According to the terms of the Note, Loan Agreement, and D. Avila Guaranty, if there was a default, the entire debt came due, along with interest, late fees, and attorney fees and costs. Burdette declared that the amount due for the principal was $152, 337.28, with accrued interest in the amount of $21,502.49, plus late fees of $850.

In this appeal, DeRoy makes several claims as to why the summary judgment grant was erroneous. DeRoy now claims that the loan was invalid, and the complaint could not be filed on this loan; the loan included an arbitration clause that was not followed; there was no corporate resolution authorizing the loan; Arrowhead had notice that DeRoy was no longer with ACI; and the loan amount was improper for an unsecured loan and was obtained by Arrowhead through fraudulent practices However, DeRoy did not raise any of these claims in the trial court. Based on the evidence before the trial court, Arrowhead had made a prima facie showing of the elements of breach of guaranty, and we cannot consider DeRoy's claims for the first time on appeal. Further, DeRoy has never presented any evidence in support of his claims.

In light of the foregoing facts and circumstances, Arrowhead made a proper prima facie showing, and the trial court properly granted summary judgment on the sixth cause of action in the motion for summary judgment.

V

DISPOSITION

We dismiss the appeal as it pertains to the writ of attachment. The judgment is affirmed. Arrowhead is awarded costs on appeal.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.